2d 1422 (1959), decided the same day, urged a number of lower court decisions which had granted *de novo* review of awards (see *Day* case, 360 U.S. 556-557 [illegible] n. 4) in support of the conclusion that the construction accorded the statute by the majority of the Court resulted in an unconstitutional disparity between employees and carriers, in that the latter could obtain a court review on the merits of adverse awards, whereas the former would be concluded by the Board's decision, without any review at all.

It is apparent that the force of the dissenting opinion in the *Day* case rests upon the assumption of the dissenting Justices that the majority of the Court, "without so much as discussing it," shared the view of the dissenters that the previous lower court cases allowing carriers a trial *de novo* were correctly decided, and that the statute did in fact afford a complete review on the merits to a railroad defending an action to enforce an award. If this assumption be incorrect, then the unconstitutional disparity of treatment of employees and carriers, relied upon by the dissenting Justices, disappears.

We submit that the conclusion is inescapable that the majority of the Court in *Price* and *Day* did not so intend to limit their decision as to the final and binding effect of the Board's determinations, or to approve a construction of the statute which would afford carriers a review on the merits of awards adverse to them while denying it to employees.

The fact that the decision in the *Price* case recognizes that "some" opportunity for a review is accorded to carriers by virtue of the exception in Section 3 First (m) of the statute to the effect that awards will not be final and

binding "insofar as they shall contain a money award" does not militate against this conclusion. *Id.*, 360 U.S. at 614-5. The exception by its terms is not directed at *all* findings of the Board in awards which incorporate directions for the payment of money, but is limited to the money features alone. Congress said only that awards would not be final and binding "insofar as" they should contain a money award. Thus, the *amount* of money due and its allocation among the beneficiaries is the only factor which is not accorded finality and which is open to independent investigation by the Court in an enforcement action. These are facts which generally cannot be determined finally until the award is complied with. The other aspects of such an award —the merits of grievances and determinations as to the rights and obligations of the parties under the applicable collective bargaining agreements—are entrusted for final and conclusive determination to the expertise of the specialized administrative tribunal. To put it another way, the Board's determination of the question of "liability" is final and binding on all parties, and only the ascertainment of "damages," a matter not foreign to the normal business of the courts, or requiring any administrative expertise, or involving the policy considerations of uniformity of interpretation of agreements and adjustments of grievances commented on in the *Day* case, 360 U.S. at pages 551-552, is left open for judicial review.

The foregoing conclusions with respect to the purport of the *Price* and *Day* decisions are supported by subsequent decisions of this court dealing with the question of the reviewability of arbitration awards. *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 4 L. Ed. 2d 1403; *United Steelworkers v. Warrior & G. Nav. Co.*, 363 U.S. 574, 4 L.

Ed. 2d 1409; and *United Steelworkers v. Enterprise Corp.*, 363 U.S. 593, 4 L. Ed. 2d 1424. These cases are relevant here both because of the Court's previous unequivocal statement, in the *Chicago River* and later cases, that the statutory provisions dealing with the Adjustment Board "were to be considered as compulsory arbitration," and because of the Court's recognition of a Congressional policy favoring final and binding arbitration of labor disputes arising from grievances or from the interpretation or application of collective bargaining agreements.

The *Enterprise* case presents a close parallel to the instant one, being an action to enforce an arbitration award. It is also significant because of the separate treatment accorded the money feature of the award, the Court ordering compliance with that part of the award calling for reinstatement of discharged employees, but withholding its approval of the monetary portion pending further proceedings.

In the face of the principles enunciated by the Court with respect to the binding effect of an arbitration award in an enforcement action, the contention that a defendant may relitigate questions of interpretation and application of agreements and grievances decided by the Adjustment Board presents such a widely differing concept of the effect of the Board's award as to render the term "arbitration" completely inappropriate to describe the Board procedure.

That such a concept is directly opposed to that enunciated in the *Price* case is, we submit, well illustrated by the fact that on the same day that it decided the *American Mfg.*, *Warrior & Gulf*, and *Enterprise* cases, the Court, in *Brotherhood of L.E. v. Missouri-Kansas-T. R. Co.*, 363 U.S.

528, 4 L. Ed. 2d 1379 (1960) in discussing disputes of the sort referable to the Adjustment Board, again recognized "the superseding purpose of the Railway Labor Act to establish a system of *compulsory arbitration* for this type of dispute. . . ." *Id.*, 363 U.S. at 531. (Emphasis supplied.)

The intent of the statute to foreclose relitigation of the merits of Adjustment Board awards, and to permit review, in the enforcement action, only of their monetary aspects, is further supported by the opinion in the recent case of *Locomotive Engineers v. Louisville & N. R. Co.*, 373 U.S. 33, 10 L. Ed. 2d 172 (1963), where the Court said:

> "The several decisions of this Court interpreting Section 3 First have made it clear that this statutory grievance procedure is a mandatory, exclusive, and comprehensive system for resolving grievance disputes."
>
> . . . . . .
>
> ". . . We do not deal here with nonmoney awards, which are made 'final and binding' by Section 3 First (m). The only portion of the award which presently remains unsettled is the dispute concerning the computation of Humphries' 'time lost' award, *an issue wholly separable from the merits of the wrongful discharge issue. . . .*" *Id.*, 373 U.S. at 38, 40-41. (Emphasis supplied.)

Finally, in its very recent opinion in the case of *Republic Steel Corp. v. Maddox*, ...*U.S.*....., 13 L. ED. 2d 580 (January 25, 1965), the Court reiterated the existence of a federal policy favoring arbitration of railway and other labor disputes; discussed previous decisions which had upheld the right to judicial determination of railroad labor disputes *(Moore v. Illinois Central R. Co.*, 312 U.S. 630 (1941),

and *Transcontinental & Western Air, Inc. v. Koppal*, 345 U.S. 653 (1953)); and indicated that in the light of the recently developed doctrine of substantive federal law governing collective bargaining agreements and favoring arbitration of disputes thereunder, the reasoning of the *Moore* and *Koppal* cases was probably no longer sound, saying, "Thus a major underpinning for the continued validity of the *Moore* case in the field of the Railway Labor Act has been removed. . . ." *Id.*, 13 L. Ed. 2d at 585.

In the instant case the court below considered and rejected the contention that the federal policy favoring arbitration of labor disputes was applicable to minor disputes in the railroad industry. (R. 232.) Its error in that respect is clearly demonstrated by the *Maddox* case.

In the *Maddox* case, the Court indicated that it was not at that time overruling the *Moore* case, stating:

> "Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that act can be appraised in context, e.g., the make-up of the Adjustment Board, *the scope of review from monetary awards*, and the ability of the Board to give the same remedies as could be obtained by court suit." *Id.* 13 L. Ed. 2d at 586, n. 14. (Emphasis supplied.)

For purposes of our case, the underscored portion of the foregoing quotation is particularly significant. We submit that it clearly supports our conclusion with respect to the import of *Locomotive Engineers v. Louisville & N. R. Co., supra*, to the effect that the awards produced by compulsory arbitration under Section 3, First, of the Railway

Labor Act are equivalent to those produced by labor arbitration generally; that "final and binding" as used in Section 3, First (m), means final and binding on both the carrier and the employees, not just on employees who lose; and that only the fact and amount of damages—the monetary aspects of an award—and not the Board's ruling on the merits of the proper interpretation and application of agreements, may be reviewed by the courts.

CONCLUSION

We submit that *de novo* judicial review of any but the money aspects of awards of the National Railroad Adjustment Board operates to defeat the clear Congressional objectives of expeditious settlement of minor disputes and grievances through compulsory arbitration; uniform and consistent interpretation and application of agreements on the property of a single carrier or, in the case of multi-carrier national agreements, throughout the industry; and the benefits of the Board's expertise gained through practical knowledge of the railroad industry and its customs and usages. The problem is compounded where, as here, a reviewing court attempts to resolve the dispute by applying strict principles of commercial contract law and the common law of master and servant. Moreover, of particular concern to the Association and its component organizations, is the utter unfairness of what amounts to a form of double jeopardy with respect to claims of employees, whereas a Board award in favor of a carrier is immune from further attack.

The need for clarification by this Court of the scope of review of awards of the National Railroad Adjustment

Board is increasingly pressing. The so-called "minor disputes" over the proper interpretation and application of agreements are frequently a major source of friction between management and labor, and involve substantial issues with respect to rights and benefits of large groups of employees. For employees to have to wait for years, as is often the case, before receiving a Board determination of these issues, and then face the prospect of having a favorable award nullified in a *de novo* judicial proceeding, is a source of widespread irritation and frustration.

Recent decisions of this Court confirming the absence of the right to strike to enforce awards, and the exclusive nature of the statutory enforcement procedure, coupled with the doctrine of complete trial *de novo* enunciated by the lower federal courts with respect to the enforcement action, have encouraged many carriers to ignore the Board's awards almost as a matter of course. As a result, litigation such as the instant case is becoming increasingly frequent, and the Congressional objectives which the Board was created to serve are being defeated.

For the foregoing reasons, it is respectfully submitted that the decision of the court below should be reversed, and the case remanded with instructions requiring that the award here involved be accorded final and binding effect on

the merits of the dispute, and that any judicial review thereof be limited to the monetary aspects of said award.

Respectfully submitted,

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Dated at Toledo, Ohio this
21st day of September, 1965.

CERTIFICATE OF SERVICE

I, Richard R. Lyman, one of the attorneys for the Railway Labor Executives' Association, as *amicus curiae,* do hereby certify that on the 21st day of September, 1965, I served the attached motion for leave to file brief as *amicus curiae* and brief of *amicus curiae* upon all parties of record herein by depositing copies thereof in the United States mails, via airmail, postage prepaid, addressed to Mr. Charles W. Decker, 45 Polk Street, San Francisco 2, California and Mr. Clifton Hildebrand, 1212 Broadway, Bank of America Building, Oakland 12, California, attorneys for petitioner, F. J. Gunther; Mr. Waldron A. Gregory, General Attorney, Southern Pacific Co., 65 Market Street, San Francisco 5, California and Mr. William R. Denton, Assistant General Attorney, Legal Department, Southern Pacific Co., 65 Market Street, San Francisco 5, California, attorneys for respondent, San Diego & Arizona Eastern Railway Company.

Richard R. Lyman